ILFA | INTERNATIONAL LEGAL FINANCE ASSOCIATION

22-AP-D

October 3, 2022

Advisory Committee on Appellate Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-300
Washington, D.C. 20544

RE: Response to September 1, 2022 Rules Suggestion from Lawyers for Civil Justice (22-AP-C) Concerning Rule 26.1

The International Legal Finance Association ("ILFA")[1] respectfully submits this response to the September 1, 2022, submission to the Advisory Committee on Appellate Rules (the "Committee") from Lawyers for Civil Justice ("LCJ") concerning Fed. R. App. P. 26.1 ("Rule 26.1"). We refer the Advisory Committee to the previous submissions by ILFA's members[2] to the Advisory Committee on Civil Rules and only briefly address the substance of LCJ's submission, as it repeats many of the previous arguments—by LCJ and others—presented to and rejected by the Advisory Committee on Civil Rules.

In 2014, 2015, 2017, 2018, 2019, 2020, and 2021, the LCJ and other aligned organizations such as the U.S. Chamber of Commerce Institute for Legal Reform, urged the Advisory Committee on Civil Rules to adopt an unprecedented proposal to force disclosure of certain funding arrangements in every civil case under Fed. R. Civ. P. 26(a)(1)(A). Having failed to advance that proposal, the LCJ now urges this Committee to adopt essentially the same proposal via amendment of a different rule, Rule 26.1. The stated rationale is that Rule 26.1 does not require disclosure of certain financing arrangements and "therefore does not assist judges in determining whether they

[1] Founded in September 2020, the International Legal Finance Association is the only global association of commercial legal finance companies. ILFA is a non-profit trade association that promotes the highest standards of operation and service for the commercial legal finance sector. Its founding members include Burford Capital, Omni Bridgeway (formerly known as Bentham IMF), and Therium Capital Management, which previously participated in the Committee's deliberations regarding legal finance.

[2] *See., e.g.,* Letter from Shannon Campagna, Executive Director, International Legal Finance Association, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (April 6, 2021); Letter from Eric H. Blinderman, Chief Executive Officer (U.S.), Therium Capital Management, Allison K. Chock, Chief Investment Officer, Bentham IMF, and Danielle Cutrona, Director, Global Public Policy, Burford Capital, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (Feb. 20, 2019); Letter from Christopher P. Bogart, Chief Executive Officer, Burford Capital, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (Feb. 20, 2019); Letter from Allison K. Chock, Chief Investment Officer, Bentham IMF, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (Sept. 6, 2017); Letter from Christopher P. Bogart, Chief Executive Officer, Burford Capital, to Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts (Sept. 1, 2017); Letter from Adam R. Gerchen, Chief Executive Officer, Gerchen Keller Capital, LLC, Christopher P. Bogart, Chief Executive Officer, Burford Capital, and Ralph J. Sutton, Chief Investment Officer, Bentham IMF, to Jonathan C. Rose, Secretary, Advisory Committee on the Rules of Practice and Procedure, Administrative Office of the U.S. Courts (Oct. 21, 2014).

pose potential conflicts of interest or create the appearance of impropriety."[3] However, as discussed below, this rule suggestion is a solution in search of a problem. There is insufficient justification to impose a rule like the one proposed by LCJ where judges already possess the authority to provide federal courts with the ability to obtain information when deemed necessary, the presence of legal finance is the exception rather than the rule, and where there are multiple forms of financing available to private litigants to which it would not apply.

In short, and for the reasons set forth below, LCJ's proposal does not merit submission for public comment or any further attention by the Committee.

Federal judges already have ample authority to determine whether a conflict of interest exists. The LCJ proposal overlooks the essential point that federal judges have ample authority to determine whether a conflict of interest exists. That is because conflict of interest is simply the cited rationale for new disclosure rules specific to legal finance. The true motivation here is to enact a mechanism by which an opposing party can obtain the financial information of its adversaries and use it to its advantage in litigation. Anyone who has spent any time in courtrooms litigating high-stakes commercial matters has encountered demands for disclosure of irrelevant information as a mechanism of delay—as "frolic and detour" that adds to the extraordinary cost of litigation and slows down an already overburdened justice system. Disclosure of legal finance implicates further concerns, the most significant of which is the potential for prejudice to financed parties.

The submission offers no explanation why the federal courts' current ability to obtain information about legal finance arrangements is insufficient to address potential concerns that may arise every so often in a particular case. Fundamentally, the proposal is a push for forced disclosure of irrelevant information that one party is simply curious to know. That is not the standard for discovery under Fed. R. Civ. P. 26, and it is not an adequate justification to amend Rule 26.1. Nor would any litigant support such a standard that would be more evenly applicable across financial interests.

As the Advisory Committee on Civil Rules appropriately observed in rejecting earlier calls for an amendment to Fed. R. Civ. P. 26 backed by a similar rationale, "judges currently have the power to obtain information about third-party funding when it is relevant in a particular case."[4] Judge Polster's order in the pending Opioids MDL in the U.S. District Court for the Northern District of Ohio is a perfect example.[5] Other federal courts have adopted this sensible approach, which balances the court's need to inquire into financing arrangements for a specific, narrow purpose with the fact that funding issues are rarely relevant to the parties' claims and defenses.[6] And still other courts have taken a broader approach that demonstrates that the federal courts already have broad discretion to order disclosure of litigation finance when they deem it appropriate.[7]

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[3] *See* Lawyers for Civil Justice, Rule Suggestion to the Advisory Committee on Appellate Rules at 1 (Sept. 1, 2022), https://www.uscourts.gov/sites/default/files/22-ap-c_suggestion_from_lcj_-_rule_26.1_0.pdf.

[4] Hon. David G. Campbell, Report of Advisory Committee on Civil Rules, at 4 (Dec. 2, 2014), https://www.uscourts.gov/sites/default/files/fr_import/CV12-2014.pdf.

[5] *See In re Nat'l Prescription Opiate Litig.*, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018).

[6] *See, e.g., MLC Intellectual Property LLC v. Micron*, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019) (noting the court's ability to "question potential jurors *in camera* regarding relationships to third party funders and potential conflicts of interest" if necessary at trial).

[7] ILFA does not endorse any particular approach but the ability to issue sufficient orders is clear.

Importantly, there have never been any real-world examples of judicial conflicts of interest in this regard; judges are acutely aware of their ethical responsibilities and would be well advised to avoid investing in legal finance entities (whether public or private). Even the LCJ concedes in a September 8, 2022, submission to the Advisory Committee on Civil Rules that "judges are (presumably) not personally investing with entities explicitly advertising themselves as 'litigation funders.'"[8] And even if a judge were to have a relationship that rose to the level of warranting disqualification, he or she would be fully equipped to issue an individual practice rule or standing order requiring disclosure of any relationship with that company—as has been done in the Northern District of California, the District of New Jersey, and by Chief Judge Connolly of the District of Delaware. In short, any concern about judicial conflict of interest is so attenuated that it cannot support the unwarranted disclosure rule targeted at a specific sector of financial institutions of the kind suggested by the LCJ proposal.[9]

The Proposed Rule is not warranted as an extension of Rule 26.1. LCJ argues that the proposed rule is an appropriate extension of Rule 26.1, which requires that a "nongovernmental corporation that is a party to a proceeding in a court of appeals" file a statement identifying "any parent corporation and any publicly held corporation that owns 10% or more of its stock."[10] But the original purpose of corporate disclosure statements stands in stark contrast to the situation here. The LCJ has not offered any evidence of a risk of judicial conflicts of interest associated with the involvement of legal finance providers. As previously stated, that is because federal judges are well aware of their ethical responsibilities, would be well advised to avoid investing in legal finance entities (whether public or private), and are fully equipped to issue an individual practice rule or standing order requiring disclosure of any relationship with that company. The current rules applied at the discretion of judges are fully capable of handling any concern about judicial conflict of interest.

The proposal inappropriately targets one subset of financial institutions for differential treatment under the Federal Rules. In the U.S. justice system, there are numerous types of entities that may have financial interests that are contingent on legal outcomes. These include: (1) law firms that work on contingency or conditional fee arrangements; (2) banks, private funds, or other

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[8] *See* Lawyers for Civil Justice and U.S. Chamber of Commerce Institute for Legal Reform, Submission to the Advisory Committee on Civil Rules (Sept. 8, 2022), https://www.uscourts.gov/sites/default/files/22-cv-m_suggestion_from_lcj_and_ilr_-_rule_16c2_0.pdf.

[9] It is important to note that, contrary to the flawed arguments presented by the LCJ proposal, there is well-developed jurisprudence in this area demonstrating that federal courts have routinely rejected discovery regarding the sources of financing in litigation unless the party seeking it makes a specific showing of relevance. *See Colibri Heart Valve LLC v. Medtronic CoreValve LLC, et al*, Case No. 8:20-cv-00847 (C.D. Cal. Mar. 26, 2021) (finding legal finance documents not discoverable; defendant's "skepticism" that plaintiff's discovery responses were not accurate or complete did not demonstrate the requisite relevance of the funding documents to the claims and defenses in the matter); *MLC Intellectual Prop. LLC v. Micron Tech., Inc.*, No. 14-cv-03657, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019) (finding that defendant's attempts to establish relevance based on potential bias and conflicts of interest concerns were speculative); *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 724 (N.D. Ill. 2014) (rejecting discovery into legal finance arrangements; noting defendant's assertion of relevance lacked "any cogency"); *VHT, Inc. v. Zillow Group, Inc.*, No. C15-1096JLR, 2016 WL 7077235, at *1 (W.D. Wash. Sept. 8, 2016) (rejecting discovery into legal finance arrangements absent "some objective evidence that any of Zillow's theories of relevance apply in this case"). Indeed, no federal court has required mandatory disclosure of financing in litigation on a scale equivalent to the Chamber's proposal. Federal courts have permitted discovery only in exceedingly rare and unique circumstances where it is, in fact, germane to the claims and defenses of the parties. The call for blanket forced disclosure flies in the face of this settled judicial consensus and the principles of relevance and proportionality.

[10] Fed. R. App. P. 26.1(a).

financial institutions which provide loans, recourse debt, or equity instruments; (3) risk-avoidance instruments from insurance companies; and (4) specialist providers of legal finance. All of these sources of outside financing could be considered "non-parties" with "financial stakes in appellate outcomes" and there is no basis for choosing among them for differential treatment.

However, that is not LCJ's intent. Rather, LCJ is focused on legal finance providers, not because of some inherent concern for the integrity of the courts or to root out conflicts of interest, but because some of LCJ's members believe that disclosure of certain legal financing arrangements will inure to the benefit of one party by prejudicing their adversary. That LCJ has sought for many years an amendment to Fed. R. Civ P. 26(a)(1)(A), a discovery provision, to force disclosure of these arrangements before proposing an amendment to Rule 26.1 demonstrates LCJ's true motivation—an unfair, forced disclosure rule that provides a strategic advantage to one party in litigation over another.

Legal finance is far less prevalent than many other types of financial interests that by policy choice have never been deemed relevant to the ultimate disposition of claims and are not required to be disclosed. As a practical matter, adding a special "legal finance disclosure rule" therefore seems both oddly specific and broadly unnecessary, given that courts have operated for decades without inquiring into the (usually irrelevant) financial health of the litigation parties and their counsel.

It is not unreasonable to assume that, if the rule suggested by LCJ were put into practice, at least some regular litigants would forgo financing for fear of triggering disclosure rules and revealing private financial information to their adversary in litigation. As the Supreme Court has recognized, requiring parties to produce potentially sensitive information can have a chilling effect on meritorious litigation,[11] an effect that would extend to litigants financing litigation. To the extent that such forced disclosure resulted in litigants declining to pursue meritorious claims, the result would be less justice. Our system of justice requires that the rules be applied evenhandedly to all participants in litigation. The Committee should reject LCJ's proposal discriminating between "non-parties with financial rights" and all others with financial interests in litigation with respect to the imposition of disclosure rules.

Legal finance is not "commonplace." Finally, it is worth noting that the LCJ overstates the prevalence of legal finance, generally and with respect to appellate cases. Last year, there were 461,478 new civil filings in U.S. district courts.[12] In comparison, the most robust public study of legal finance data study found that in 2021, the number of legal finance investments with a nexus to the U.S. was less than one-tenth of one percent of the number of federal cases.[13] The LCJ cites no data to support its assertion that legal finance is present in a material number of appeals. To the contrary, it cites a public survey estimating the claim values in financed litigation. Putting aside the questionable accuracy of that survey, the *value* of financed claims is not an indicator of the *number* of financed cases. This is particularly true given that commercial legal finance providers are highly selective and predominantly invest in matters where tens to hundreds of millions of

[11] *See* Lawyers for Civil Justice, Submission to the Advisory Committee on Civil at 16, (Mar. 24, 2021), http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_comment_on_sealing_of_court_records_march_24_2021.pdf.

[12] *See* Federal Judicial Caseload Statistics 2021, available at https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2021.

[13] *See* The Westfleet Insider: 2021 Litigation Finance Market Report, https://www.westfleetadvisors.com/publications/2021-litigation-finance-report/.

dollars are in dispute. Such matters are obviously exceptional. The LCJ proposal's disproportionate focus on legal finance can only be explained by the fact that its existence levels the playing field in matters where their constituents traditionally held the upper hand in terms of resources and expertise. That is certainly not a reason to change Rule 26.1—or any other federal rule—particularly given that legal finance affects such a marked minority of federal litigation and where no identifiable problem exists.

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The Committee should hew to the basic framework and practice that has historically worked in federal court and decline to adopt the overbroad disclosure requirements proposed by LCJ. The current disclosure regime in the Rules strikes an appropriate and time-tested balance between the interest in avoiding conflicts of interest and protecting litigants' ability to freely obtain all types of financing, especially without any evidence of a problem. The LCJ proposal rests on a basic misconception of the role of legal finance in litigation, as compared to other more widely used forms of financing, and contravenes the principle that federal rules of procedure be applied evenhandedly to all participants in litigation.

For the foregoing reasons, and for all the reasons we have stated in previous submissions to the Advisory Committee on Civil Rules, we respectfully submit that LCJ's renewed request, albeit in a new venue, does not merit this Committee's consideration.

Respectfully submitted,

/s/

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